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**MOTION FOR ORDER DIRECTING STATE'S COMPLIANCE
WITH TENN.R.CRIM.P. 12(d)(2)**

Comes now the Defendant, by and through counsel, pursuant to Rule 12(d) of the Tennessee Rules of Criminal Procedure, and moves this Court to order the State to comply in writing with the mandatory provisions of Tenn.R.Crim.P. 12(d)(2). The Defendant would show as follows:

- 1) The Defendant was arraigned in this matter on August 17, 2005. Counsel for the Defendant on August 23, 2005 served a written request for discovery on the office of the District Attorney General.
- 2) The Defendant's request for discovery at page 7 thereof specifically stated the accused's request pursuant to Tenn.R.Crim.P. 12(d)(2) that the State give notice of its intention to use (in its evidence in chief at trial) any evidence which is

discoverable under Tenn.R.Crim.P. 16.

- 3) Despite the mandatory provisions of §§ 10.01 and 10.02 of the Local Rules of Practice, the pretrial scheduling order provided to the parties at the time of arraignment failed to address any issue(s) related to discovery. Counsel for the State on September 7, 2005 served an initial written response to the request for discovery. This initial discovery response, which included a significant volume of material, nevertheless completely omitted any mention of the Defendant's Rule 12(d)(2) request.
- 4) Defense counsel by this motion request the Court to order counsel for the State to respond in writing to the Defendant's Rule 12(d)(2) request, with the requisite specificity contemplated by the opinion of the Court of Criminal Appeals of Tennessee in *State v. Louis Francis Giannini*, C.C.A. No. 36 (Shelby Co.), 1991 Tenn. Crim. App. LEXIS 477, **13-14 (June 12, 1991) (copy attached):

The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. . . .

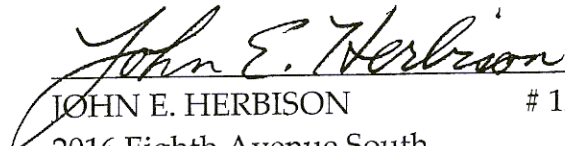
Contrary to the contention of the assistant district attorney general, compliance with Rule 12(d)(2) by the State is not discretionary. The rule contemplates compliance by the State. When the State fails to comply with a defense motion predicated upon this rule, the trial court can order compliance. Moreover, responding that the State intends to "use in its evidence in chief at trial all evidence to which the defendant may be entitled discovery pursuant to Rule 16" does not constitute compliance with the rule.

Such a response does not comport with the spirit or letter of Rule 12. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce.

The Defendant would observe further that "testimony regarding items of evidence that could be suppressed must also be included in a Rule 12(d)(2) notice." *State of Tennessee v. Thomas Dee Huskey*, C.C.A. No. E1999-00438-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 550, *351 (June 28, 2002) (copy attached). Discovery under Tenn.R.Crim.P. 16 is not an opportunity to play hide the ball, nor to play hide the testimony about the ball, by means of a "document dump" more commonly employed as an abusive discovery tactic in civil litigation.

THE FOREGOING PREMISES CONSIDERED, the Defendant moves the Court to order counsel for the State to comply in writing with the mandatory provisions of Tenn.R.Crim.P. 12(d)(2) by provide the defendant with specific information concerning which evidence, discoverable under Tenn.R.Crim.P. 16, that the State intends to introduce.

Respectfully submitted,

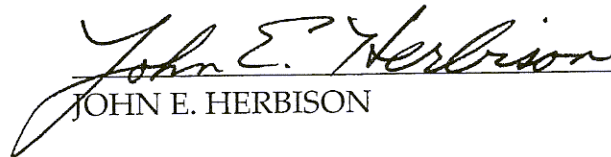

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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered or mailed, first class postage prepaid, to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 8TH day of September, 2005.


JOHN E. HERBISON